

SOUTH AFRICA / JUDGMENT

S v Mhlophe (245/2015) [2015] ZAFSHC 232 (10 December 2015) [2015] ZAFSHC 232

COURT

Free State High Court, Bloemfontein

BEFORE

A. Kruger, M.B. Molemela

CASE / FILE NUMBER

245/2015

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FREE

STATE HIGH COURT, BLOEMFONTEIN

REPUBLIC

OF SOUTH AFRICA

Review

No: 245/2015

In

the review of:

THE
STATE
and
DEAMANE
GOLLET MHLOPHE

CORAM:

MOLEMELA
JP et
KRUGER,
J

JUDGMENT

BY: KRUGER, J

DELIVERED ON: 10 DECEMBER 2015

- [1] This matter was sent on special review in terms of section 304(4) of Act 51 of 1977. The accused was charged with a contravention of section 63(1) of the National Road Traffic Act 93 of 1996, reckless or negligent driving, alternatively of a contravention of section 64 of Act 93 of 1996, inconsiderate driving. Section 83 of the Criminal Procedure Act 51 of 1977 provides:

“Charge where it is doubtful what offence committed

If by reason of any uncertainty as to the facts which can be proved or if for any other reason it is doubtful which of several offences is constituted by the facts which can be proved, the accused may be charged with the commission of all or any of such offences, and any number of such charges may be tried at once, or the accused may be charged in the alternative with the commission of any number of such offences.”

(My underlining)

When the prosecution is in doubt as to the facts the state can prove or as to the legal position, charges are put in the alternative, as permitted in section 83. The court then convicts on the charge that in its view suits the proven facts best.

- [2] The accused was defended and pleaded not guilty to both the main and alternative charge. According to the magistrate’s

judgment the evidence showed that the accused drove through a stop street and collided with the complaint’s vehicle which was driven by police officers. The magistrate found that the accused should have stopped and allowed the intersection to clear before he moved forward. At the end of the judgment the magistrate says:

“You are hereby found guilty on both count 1 and 2, on both count 1 and the alternative count.”

- [3] In passing sentence the magistrate said:

“Also looking at the fact the offences for which I have found you guilty they arise out of the same facts, the same cause of action, in imposing sentence count one and the alternative count will be taken together for purposes of sentencing.”

He was sentenced to a fine of R4 000.00 or six months imprisonment, half of which was suspended for three years. The court decided not to suspend the accused’s driver’s licence.

- [4] The Senior Magistrate Welkom says the accused cannot be convicted on both the main and alternative counts on the same set of facts, with reference to *S v Grobler en ‘n Ander* 1966 (1) SA 507 (A) at 522E-F, and asks that the conviction and sentence be set aside. If an accused’s act brings him within the ambit of two penal statutory provisions he is not to be punished twice for the same act (*Grobler* at 522B-C)
- [5] When one refers to alternative in relation to two things, they are mutually exclusive (Concise Oxford Dictionary). The theologian Dietrich Bonhoeffer said “The weak always have to decide between alternatives that are not their own”.

The diplomat Abba Eban said, “History teaches us that men and nations behave wisely once they have exhausted all other alternatives”. An alternative is a substitute or a replacement (Oxford Thesaurus of English). An alternative is the choice between two mutually exclusive possibilities (American Heritage Dictionary of the English Language). It is one or the other, not both. The traditional view is that the choice is between two because “alter” means “the other (of two)”. The acceptance of one involves the rejection of the other (Fowler’s Modern English Usage 3rd Ed. (2004)).

- [6] An alternative count is exactly what it is called, alternative. An accused can be convicted either on the main count or on the alternative count, not on both as the magistrate did here. The conviction and sentence were irregular.
- [7] It has not been possible to reconstruct the record of the evidence led. Thus it is not possible to assess whether the guilt of the accused on one charge was established.

ORDER

The conviction and sentence are set aside..

A. KRUGER, J

I agree.

M.B. MOLEMELA, JP

/wm

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